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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No .....

HUMPHREY ROSS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, HUMPHREY ROSS, respectfully petitions for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Ninth Circuit affirming his conviction for conspiracy to sell and sale of narcotics, entered by the Court of Appeals on March 2, 1973

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported and appears as Appendix "A" to this petition A timely petition for rehearing and suggestion for rehearing in banc was denied on April 25, 1973 A copy of the court's order is attached to the petition as Appendix "B"

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1973 Mr Justice Douglas extended the time for filing a Petition for Writ of Certiorari to and including May 2, 1973 The jurisdiction of this Court is invoked under 28 U S C § 1254(1)

QUESTIONS PRESENTED

I Whether the denial of the government's—as well as petitioner's motion—to sever defendants operated to deprive petitioner of due process and a fair trial, by preventing him from producing exculpatory evidence

II Whether petitioner was deprived of a fair trial by prejudicial newspaper publicity of which one-half of the jurors had knowledge, but only one of whom would admit to such knowledge

STATEMENT OF THE CASE

Petitioner, Humphrey Ross, was charged with violations

of 26 U S C § 4705, 18 U S C § 2, 21 U S C § 174 and 21 U S C § 841(a) in four counts of an eighteen-count indictment alleging narcotics offenses involving petitioner and five other defendants

Pretrial motions to sever the defendants were made by the government as well as by petitioner These motions were denied, and a nine-day jury trial ensued The jury commenced deliberations on the morning of December 23rd and returned with verdicts of guilty as to all defendants on all counts at 3:50 p m that same afternoon Petitioner was sentenced to thirty years imprisonment and was fined the sum of $30,000 00

On appeal, one conspiracy count, for violation of 21 U S C § 841(a), was ordered dismissed by the Court of Appeals and petitioner's fines were reduced by the amount of $7,500 00

STATEMENT OF FACTS

On March 5, 1971, Detective Jeanette Schrader, of the Seattle Police Department Narcotics Division, working in an undercover capacity, purchased a small quantity of narcotics from Leon Noah (RT[1] 83) She had met Noah at Griffin's Shoe Shine Parlor, located in the City of Seattle, and on the day of the sale, Noah gave her the telephone number of the shoe shine parlor and said he could be reached at that place (RT 98)

On March 25, Detective Schrader again purchased narcotics from Noah and at this time was told that

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[1] "RT" refers to Reporter's Transcript of trial

co-defendant Stuart was selling drugs from the parlor (RT 126) About a week later the detective made another purchase from Noah near the shoe shine parlor and was told to contact Betty Satrogianis if she desired more narcotics (RT 147)

A few days later Mrs Schrader called the parlor to arrange a narcotics transaction with defendant Richard Stuart Later, she purchased heroin from defendant Noah in Stuart's presence (RT 157-159)

On April 8, 1971 Detective Schrader placed a call to Richard Stuart at the shoe shine parlor and was told she would be met at the corner of 14th and Jefferson Streets (RT 162-164) Stuart arrived at that location in a white Comet automobile, accompanied by an unidentified female and a man who Mrs Schrader identified as petitioner, Humphrey Ross (RT 165) The Comet pulled alongside Mrs Schrader's car, and both Stuart and Ross pointed in an easterly direction, indicating that she should follow them (RT 166) After she had followed them for a few blocks, Stuart parked the car, got out and came back to her car and sold her a quantity of heroin (RT 168)

During the next two weeks, Stuart made a series of direct sales of heroin to Detective Schrader in her undercover capacity

On the night of April 25, 1971 Detective Schrader met with Stuart at 14th and Jefferson Streets Stuart arrived in a Cadillac driven by petitioner, Humphrey Ross (RT 201) Stuart got into Mrs Schrader's car and directed her to drive to a motel parking lot The Cadillac disappeared and a surveilling officer testified that on the same night he saw Stuart, petitioner Ross and another unidentified male

leave the shoe shine parlor, get into a Cadillac and drive to the corner of 14th and Jefferson Streets where they met Detective Schrader's car (RT 428-430) Twenty minutes later, the surveilling officer saw the Cadillac parked on the street in front of Betty Satrogianis' house, with petitioner seated alone behind the wheel (RT 433-434)

The Cadillac next appeared at the motel parking lot, driven by petitioner with Betty Satrogianis in the passenger seat (RT 210) Stuart exited Detective Schrader's car, walked over to the driver's side of the Cadillac and put his hands on the window for a couple of seconds (RT 212-213), then he returned to the detective and handed her an envelope containing heroin

On the night of May 5, 1971, Detective Schrader met with Stuart alone at a McDonald's hamburger stand and purchased heroin and cocaine (RT 224-229) On May 9, Stuart met Detective Schrader and Agent John Sutton, of the Bureau of Narcotics and Dangerous Drugs, who was introduced to Stuart as Schrader's "partner" (RT 232) Stuart arrived at the corner of 14th and Jefferson in an Oldsmobile station wagon accompanied by co-defendant Willie Willingham (RT 240). Subsequently, the defendants and the narcotics officers rendezvoused at McDonald's hamburger stand and a prolonged discussion ensued between the four persons concerning prices, quantity and availability of narcotics (RT 238-243) Shortly after these negotiations, Willingham sold narcotics to Agent Sutton (RT 251-252)

On the night of July 26, Detective Schrader once again met with Richard Stuart after he had arrived at a street corner as a passenger in a white Oldsmobile station wagon driven by petitioner and which contained two other unidentified males

(RT 286-287) Later that same evening, Stuart got into the detective's car and instructed her to drive to another street corner, where he exited the vehicle, went over to a tree and picked up a package of narcotics from its base (RT 295); then he handed the package to the detective They were followed to the location by the Oldsmobile station wagon which petitioner was driving, and as the wagon passed Mrs Schrader's car, Stuart remarked, "That's him" (RT 296)

On cross-examination Mrs Schrader admitted that her identifications of petitioner on April 8 and April 25 were based upon a 12 to 15 year old blurred picture of petitioner; that she could have been mistaken at the time of her identification, and that she never talked with or purchased any narcotics from Mr Ross (RT 319-322) Furthermore, although the detective identified defendant Willie Willingham as the man with whom she discussed narcotics sales on May 9, her report of the sale to BNDD Agent Sutton (drafted May 10) positively identified petitioner, Humphrey Ross, as the man with whom they were dealing (RT 328) Mrs Schrader testified that her erroneous identification of Willingham as petitioner Ross, after a face-to-face confrontation on May 9, was based upon her two prior identifications of Ross on April 8th and 25th with the aid of the old, blurred photograph (RT 328)

On June 24, 1971 a search warrant was served on the home of Betty Satrogianis and co-defendants Abraham Griffin and Willie Willingham were found therein, together with a quantity of heroin (RT 566)

The dark green Cadillac surveilled on the night of April 25th was registered to petitioner's sister, Natalie Ross (RT 935-941) and had been purchased by petitioner in September of 1970 (RT 933-935)

In his defense, petitioner presented four character witnesses from petitioner's home town of Pasco, Washington, which is over two hundred miles from the City of Seattle. The witnesses offered testimony that placed Mr Ross in Pasco on the night of July 6th, the same night which Detective Schrader testified that she had seen petitioner in the home of Betty Satrogianis which had been placed under surveillance (RT 372, 1278-1312).

REASONS FOR GRANTING THE WRIT

1. The time has come for this Honorable Court to grant a writ of certiorari in order to fashion standards for determining what quantum of proof a defendant must supply in order to merit a separate trial, where the motion for severance is based upon the possibility that a co-defendant would give exculpatory testimony at that separate trial

Both the government and defense counsel made motions prior to trial, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, to sever defendants Stuart and Ross from all others (CT[2] 216-217). The grounds for the government's motion were that the prosecutor felt that a trial of all six defendants together was confusing to the defendants as well as to the jury and that the prosecution's witnesses could be used more effectively in separate trials (PT[3] 7).

Petitioner also moved the court for a separate trial, on the ground that he would be deprived of exculpatory evidence

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[2] "CT" refers to Clerk's Transcript on Appeal

[3] "PT" refers to Reporter's Transcript of Pre-Trial Motions

if unable to call as witnesses co-defendants Stuart and Willingham Defense counsel represented to the court that he had talked with defendants Stuart and Willingham and they had advised him that petitioner was not in fact the driver of the green Cadillac on April 25th as alleged in Count XVI and Count XXIII (PT 5) Mr Willingham had in fact told defense counsel that it was *he, Willingham* who had driven the car on that date

After the government rested, petitioner once again moved the court for leave to call co-defendants Stuart and Willingham as witnesses (RT 1268) The court ruled that this would not be permitted, and petitioner moved for a mistrial on the grounds that he had been deprived of his Sixth Amendment right to present evidence in his own defense and that he had been denied the right to confrontation of witnesses (RT 1274-1275)

On motion for a new trial (CT 278) counsel explained to the court that had Mr Willingham and Mr Stuart been summoned to testify in a separate trial, they would have offered testimony that a Mr Catlin was the passenger in the Comet who was identified by Detective Schrader as Humphrey Ross on April 8th Furthermore, their testimony would have revealed that it was Mr Willingham who was the driver of the car on April 25th Such testimony would certainly tend to exonerate petitioner on Counts XVI and XXIII, and it would also explain how all of the police officers could have mistakenly identified Willingham as Humphrey Ross on May 9th The trial court is under a continuing duty at all stages of the trial to grant a severance if prejudice appears *Simmons v. United States*, 405 F 2d 1381 (D C Cir 1968)

While petitioner concedes that the burden is upon the defendant to make a strong showing of prejudice in order to

obtain the relief permitted by Rule 14 (*Williamson v. United States*, 310 F 2d 192 [9th Cir 1962]), petitioner submits that the test of prejudice was clearly met In *United States v. Echles*, 352 F 2d 892 (7th Cir 1965), the court reiterated the principle that a single joint trial of several defendants may not be had at the expense of one defendant's right to a fundamentally fair trial In that case it was held that where it appeared in the trial of an attorney accused of suborning perjury that he would be unable to call his client, who was a co-defendant, to the witness stand for the purpose of getting into evidence the client's prior statements holding the attorney blameless, the court s denial of the attorney's severance motion was erroneous and required reversal See, also, *United States v. Gleason* 259 F Supp 282 (D C N Y. 1966).

In holding that petitioner has not made a sufficient affirmative showing that the two co-defendants would actually testify at a severed trial, the Court of Appeals relied upon *United States v. Thomas*, 453 F 2d 141 (9th Cir 1971), and *Fields v. United States*, 408 F 2d 885 (5th Cir 1969) However, in *Thomas* the District Court was informed in advance that the co-defendant would be advised not to testify in a separate trial, and in *Fields* the Fifth Circuit found the defendants' showing of probable prejudice insufficient because the District Court was being asked to speculate on what the co-defendants' testimony would be at a separate trial.

In the instant case, the likelihood of co-defendants Willingham and Stuart testifying at a severed trial was not remote, nor was the trial court being asked to speculate on what their testimony would be The attorneys for these men did not represent to the court that they would urge their clients to assert their Fifth Amendment privilege; nor was the

District Court being asked to speculate on whether or not the testimony would be exculpatory Here, there was positive certainty that the testimony would exculpate petitioner

Byrd v. Wainwright, 428 F 2d 1017 (5th Cir 1970), articulates the proposition of a single joint trial of several defendants may not be had at the expense of one defendant's right to a fundamentally fair trial At a time when the government is increasingly resorting to the charge of conspiracy in order to bring together diverse defendants for trial *en masse*, it is respectfully submitted that the issue presented herein is ripe for adjudication

2 The government's intended final witness, Sandra Dinsmore, who was mentioned in the prosecutor's opening statement as a key link between petitioner Ross and the other conspirators (RT 80), failed to appear. The United States Attorney indicated to the court that the witness was physically incapable of giving testimony, and he requested the court to instruct the jury to disregard his opening remarks as to what her testimony would be (RT 952) Thereafter, the prosecution rested.

On the following morning, Friday, December 17th, the headlines of the Seattle Post-Intelligencer read: "DOPE CASE WITNESS REFUSES TO TESTIFY" (RT 1072) A hearing was had, outside the presence of the jury, to determine whether or not the government would be able to introduce Miss Dinsmore's testimony via the transc[illegible] from a previous trial of the same defendants wherein the court declared a mistrial after she had testified During the hearing, the court made the following remarks

"THE COURT I will say this, that in the last

> trial I never saw such fear in a person in my life, outside of military combat or something of that kind, and that is the reason you got a mistrial, because those reactions are noticed by the jury That is the reason I granted a mistrial, because of the terrific prejudice that was involved." (RT 1114-1115)

At the conclusion of the hearing, the court ruled that the government would not be allowed to introduce Miss Dinsmore's testimony by way of the transcript of the previous trial (RT 1118) The jury was brought back in, and the court inquired as to whether or not any of the members of the panel had seen the headlines or read the story in the Post-Intelligencer. All of the jurors replied in the negaitve with the exception of Mr. Jackson, juror number 9 (RT 1125)

Mr Jackson was then taken into the court's pre-trial conference room and examined at length by the court and counsel as to whether or not he drew any conclusions about the case from the headlines and whether or not he had read beyond the headline and into the story (RT 1138)

Mr. Jackson stated that his capacity to serve as an impartial juror had not been affected in any manner whatsoever by the headlines (RT 1141) However, Mr Jackson candidly admitted that half a dozen other jurors in the jury room that morning had stated that they had seen the headline and "skimmed it" (RT 1139)

The court was of a mind that the newspaper article, if read, would create a prejudice against all the defendants, including petitioner Ross (RT 1148-1149) However, when defense counsel elected not to poll all of the members of the jury individually as to possible prejudice from the news-

paper article, the court determined that Mr Jackson was eligible to remain on the panel and that the case should proceed with the defense witnesses

Due process requires that the accused receive a trial by an impartial jury, free from outside influences and, if publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered *Sheppard v Maxwell,* 384 U.S. 333 (1966) The instant case was accompanied by a wave of publicity when it was first tried in Seattle It appears from the record that the case was also being publicized on local television news programs (RT 1120) In *Marshall v United States,* 360 U S 310 (1959), this Court set aside a federal conviction where the jurors were exposed by the news media to information that was not admitted at trial At the same time, the Court stated that it did not consider dispositive a statement of each juror that he would not be influenced by news articles, that he would decide the case only on the evidence of the record, and that he felt no prejudice towards the defendant as a result of the articles See *Marshall, supra,* at page 312

Likewise, in *Irvin v. Gowd,* 366 U S 717 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, the Court set aside the conviction, holding.

> "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . " (*Id.* at page 728)

While it is true that each case must turn on its special facts and the fundamental fairness of a trial depends upon the totality of circumstances, it is submitted that the prejudicial

newspaper publicity, of which the jurors had knowledge but refused to admit, was a crucial factor to be considered in determining whether or not petitioner was convicted by a fair and impartial jury solely on the basis of evidence produced at trial.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

B GRAY WARNER, ESQ. of
WARNER, PIERCE & PEDEN

and

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Attorneys for Petitioner

Appendix "A" and
Appendix "B" attached.

APPENDIX

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"B"	Order (denying petition for rehearing and suggestion for rehearing in banc	17

APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. LEON DUDLEY NOAH, Defendant-Appellant. No. 72-1807.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. RICHARD R. STUART, Defendant-Appellant. No. 72-1808.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. WILLIE WILLINGHAM, ABRAHAM GRIFFIN, Defendants-Appellants. No. 72-1809.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. VIRGIL METCALF, Defendant-Appellant. No. 72-1810.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HUMPHREY ROSS, Defendant-Appellant. No. 72-1865.

[March 2, 1973]

Appeal from the United States District Court for the Western District of Washington.

Before: BARNES and CHOY, Circuit Judges, and JAMESON*, District Judge.

CHOY, Circuit Judge:

Appellants were indicted on 18 counts[1] for trafficking in

*Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

[1]The original indictment filed on July 28, 1971 contained 26 counts A trial was conducted, but because of the prejudicial testimony of a government witness a

heroin and cocaine and conspiring to do so. Two of the counts were for possession of narcotics with intent to distribute, based on the seizure of narcotics from the residence of two of the appellants. The other fourteen substantive counts were for twelve sales by various members of the conspiracy to a government undercover agent.[2] These sales took place between March 5, 1971 and July 28, 1971. Two separate counts of conspiracy were charged.[3]

All six appellants were tried jointly by a jury and found guilty on all counts as charged. All six have filed timely appeals. We affirm as to all with directions and one of Ross's $7,500 fines is stricken. We consider each appeal separately.

LEON DUDLEY NOAH

1. Missing witness instruction.

Noah asked that the court give an instruction to the effect that since the government did not produce a certain witness there is a presumption that her testimony would have been unfavorable to the government's case. The court refused to give the instruction and Noah appeals that ruling.

The failure of a party to produce a material witness who could elucidate matters under investigation gives rise to a presumption that the testimony of that witness would be unfavorable to that party if the witness is peculiarly within the party's control. *World Wide Automatic Archery, Inc. v.*

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mistrial was declared. The case was consolidated and 8 substantive counts were dropped by the government before the commencement of the second trial.

[2]Two of the sales involved both heroin and cocaine and for these sales there are four instead of two counts. All of the other sales involved only heroin.

[3]Two conspiracies were charged instead of one because pending the investigation a new federal narcotics statute went into effect.

United States, 356 F 2d 834, 837 (9th Cir 1966). Here the government did not call as a witness a paid informer who was instrumental in the government's investigation. Noah asserted that the government entrapped him and the missing witness could have elucidated this aspect of the case. We do not think that the trial court erred in not giving the instruction.

The record does not indicate that this witness was peculiarly within the power of the government. The issue of her availability was a question of fact for the trial court to decide. While the informer was at one time associated with the government, there was a break in the relationship. The witness left the state about three months before appellant's indictment and five months before trial and no one knew of her whereabouts. She was equally unavailable to both Noah and the government. The instruction was properly rejected as not warranted by the facts of this case [4] *United States v. Makekau*, 429 F 2d 1403 (9th Cir), *cert. denied* 400 U S. 904 (1970).

2. Entrapment instructions

Noah claims that the court erred by instructing the jury that the defense of entrapment is applicable only when a person has no previous intent or purpose to violate the law and has a readiness and willingness to break the law. Noah maintains that since he was a drug addict he should be entitled to a special entrapment instruction. The law is clear that if

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[4] We note that there is an additional aspect to the problem of the witness's unavailability. The government helped her leave the jurisdiction since they provided her with a train ticket. The government should not cause a prospective witness to leave the jurisdiction so that he would not be available to testify. In this case, however, we find nothing improper since there was no evidence of such sinister motivation on the part of the government. The witness departed five months before the trial (three months before the end of the investigation) and it appears that the witness herself wanted to leave so that she could start a new life in another city.

a predisposition to break the law exists before the government makes any offer, the entrapment defense does not apply [5] *United States v. Griffin*, 434 F.2d 978 (9th Cir. 1970), *cert denied* 402 U.S. 995 (1971).

3. Dismissal of part of the indictment

Noah contends that his Fifth Amendment rights were violated when the court, pursuant to F.R.Crim.P. 48(a) dismissed five substantive counts from the indictment. Noah claims that by eliminating the substantive counts the theory of the original indictment was changed without the indictment being resubmitted to the grand jury.

We see no merit in Noah's contention. He was in no way prejudiced by the elimination of part of the indictment. An indictment may not be broadened except by the grand jury *Stirone v. United States*, 361 U.S. 212 (1960). Here the indictment was not expanded, but consolidated and some of the charges were eliminated. There is no Fifth Amendment prohibition against this.

4. Prejudicial publicity.

The day after the prosecution rested, a newspaper article appeared in a local paper. The headline read, "Dope Case Witness Refuses to Testify." The article referred to a government witness who the government claimed was too

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[5] We also note that the defense of entrapment is not available to either Noah or Stuart. The rule in this circuit requires that the defendant admit the criminal act before he can successfully assert that he was entrapped. *United States v. Azadian*, 436 F.2d 81, 83 (9th Cir. 1971). Although this rule has been criticized, it is still the law in this circuit. Moreover, the instant case does not present such an intolerable degree of government participation in the criminal enterprise to come within the limited exception to the prevailing rule. See *United States v. Granger*, ___ F.2d ___ (9th Cir. February 5, 1973).

sick to testify [6] The court asked the jurors whether any of them had either read the article or seen the headline Only one juror admitted that he had read the headline This juror was examined at length to determine if he had been influenced by the article The court decided that the juror could still remain fair and impartial

During the examination, however, this juror said that probably half a dozen other jurors also saw the headline The defense was given an opportunity to question the other jurors, but declined to do so and moved for a mistrial instead That motion was denied We affirm the ruling

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial *Holt v United States*, 218 U S 245, 251 Generalizations beyond that statement are not profitable, because each case must turn on its special facts" *Marshall v United States*, 360 U S 310, 312 (1959) Here, all that was established was that one juror admitted reading the headline and he thought that others had also seen the headline The headline itself was not prejudicial It simply stated that a witness had refused to testify The jury was already aware that the witness had not appeared after she was called as a witness

While the article itself was potentially prejudicial, there is no evidence that anyone read it The defense was given an opportunity to question the jury Unless we assume that each juror purposely lied to the court, we cannot find that the publicity prejudiced the jury against the appellants The

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[6] The gist of the article was that the witness had refused to testify not because she was sick but because she was afraid she would be harmed if she did testify

burden to show that a defendant had been unfairly treated is on the defendant. *Marshall v. United States*, 355 F 2d 999, 1007 (9th Cir.), *cert. denied* 385 U S. 815 (1966). Here that burden has not been met.

5. Habeas corpus petition.

Pending this appeal, Noah filed a motion for a writ of habeas corpus. He contends that the method used to select the jury violated the Fifth and Sixth Amendments. Noah notes that of the approximately 200 odd veniremen only two were non-whites and that non-whites constitute 5.9% of the population of the Western District of Washington.

Since an appellate proceeding is pending, we have the power to issue a writ of habeas corpus. *Adams v. United States ex rel. McCann*, 317 U S. 269 (1942). But Noah has failed to sustain the burden of proof of showing a systematic exclusion of non-whites. *Swain v. Alabama*, 380 U S. 202 (1965); *United States v. Parker*, 428 F 2d 488 (9th Cir.), *cert. denied* 400 U S. 910 (1970). "The use of voter registration lists as the sole source of the names of potential jurors is not constitutionally invalid, absent a showing of discrimination in the compiling of such lists." *Parker, supra* at 489.

Noah concedes that there was no conscious effort to exclude non-whites, but he argues that discrimination is inherent in the use of voter lists. Noah, however, has failed to present sufficient evidence to prove that there is in fact a sufficiently large under-representation of non-whites. *Bloomer v. United States*, 409 F 2d 869 (9th Cir. 1969).

The motion for a writ of habeas corpus is denied.

RICHARD STUART

1. Improper counts

Stuart contends that one of his two conspiracy convictions should be reversed The indictment contained two conspiracy counts The first one charged a conspiracy to violate 21 U S C § 174 between March 1, 1971 and April 30, 1971; the second charged conspiracy to violate 21 U S C § 841(a) between May 1, 1971 and July 28, 1971 Two conspiracy counts were charged because of the conspiracy statutes themselves although there was but one continuing conspiracy On May 1, 1971, a new statute, the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U S C §§ 801-966, took effect, replacing other federal narcotics laws For activities preceding May 1, appellant was charged under the old statute, and for activities after May 1, he was charged with conspiring under the new statute

Presenting evidence of violations of different statutes does not create separate conspiracies out of one conspiracy The gist of the crime of conspiracy is an agreement to commit unlawful acts "The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one" *Braverman v. United States*, 317 U.S. 49, 53 (1942)

No evidence was advanced at the trial to suggest that the defendant and his co-conspirators formed a new agreement, made new plans, or developed a new purpose after the new federal law went into effect Since there was only one agreement there could be only one conspiracy conviction Therefore, we vacate Stuart's conviction of the first

count and order that it be dismissed.[7]

Even though we vacate one of the conspiracy convictions, this does not alter Stuart's sentence. Stuart received a thirty-year sentence on the first conspiracy count and a fifteen-year sentence on the second conspiracy count. In addition, he received five other thirty-year sentences and five other fifteen-year sentences for participating in ten illegal narcotics sales. All of the sentences are concurrent. We can say with fair assurance that the improper conspiracy conviction did not in any way influence the other convictions. *Kotteakos v. United States*, 328 U.S. 750, 764-5 (1946). There was clear evidence that Stuart had participated in several sales.

Stuart also maintains that two of the substantive convictions were improper. He contends that it was improper to charge a separate count for the sale of heroin and cocaine. We need not reach the merits of this issue because even if we reversed these two convictions, the validity of the other concurrent sentences would not be affected. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *United States v. Munns*, 457 F.2d 271, 274 (9th Cir. 1972).

2. Improperly admitted evidence

Stuart contends that he should be acquitted on all counts because the government failed to prove that the heroin tested by its chemists was the same substance sold to the government. This contention has no merit. First, no objection was made at the time the evidence was admitted.

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[7] In the light of our disposition of the case we need not reach this issue, but we uphold the least severe of the convictions. *Brown v. United States*, 299 F.2d 438, 440 (D.C. Cir. 1962).

On this fact alone we could affirm *Scott v. United States* 317 F 2d 908 (D C Cir 1963). Second, ample evidence was adduced during the trial to enable the jury to conclude that the narcotics purchased from Stuart were the same as the exhibits admitted into evidence *Barquera v. California*, 374 F.2d 177 (9th Cir 1967); *United States v. Baca*, 444 F 2d 1292 (10th Cir), *cert. denied* 404 U.S 979 (1971).

3. Entrapment instructions

Stuart maintains that the court's instructions on entrapment were erroneous because they were ambiguous and they did not clearly explain who had the burden of proof If the instructions were vague or ambiguous that would be grounds for reversal *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966) But the instructions in the case at bar were not defective In *United States v. Griffin*, 434 F 2d 978, 981 (9th Cir 1970), *cert. denied* 402 U S 995 (1971), we approved exactly the same instructions [8]

WILLIE WILLINGHAM and ABRAHAM GRIFFIN

1. Conspiracy conviction

Willingham and Griffin contend that their convictions for conspiring with Ross and Stuart after May 1 must be reversed because there was no evidence that two conspiracies existed Griffin also contends that there was insufficient evidence to support his conviction.

Willingham and Griffin were named in but one conspiracy count, unlike Stuart and Ross The government concedes that the evidence showed only one pattern of conspiratorial

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[8] See note 5, *supra*.

activity by the appellants from March through July 1971, but because of the changes in the law they elected to prosecute Willingham and Griffin under the new law. The evidence of their participation in the conspiracy surfaced after the change in the law. They were indicted and convicted on only one conspiracy charge. Under these circumstances, and in light of the fact that the penalties under the new statute are smaller, we see nothing improper or prejudicial to them in the government's separation of the illegal activities.

We also affirm Griffin's conspiracy conviction. On appeal the evidence is viewed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Magana*, 453 F.2d 414 (9th Cir. 1972). While there was no evidence that Griffin directly participated in any of the illegal sales, there was sufficient evidence to sustain a finding by the jury that Griffin was a member of the conspiracy.

Griffin's home was used as a stash for the drugs and the site where the drugs were cut into retail quantities. Moreover, when Griffin was arrested 16 balloons of heroin were discovered in his bedroom. Paraphernalia for both diluting and packaging heroin was found in various common areas of the house. The jury rejected Griffin's defense that he was a mere bystander. Testimonial evidence also supports the conviction. *United States v. Stanley*, 427 F.2d 1066, 1070 (9th Cir. 1970), *cert. denied* 404 U.S. 996 (1971).

VIRGIL METCALF

1. Challenge to the jury

Metcalf contends that the Jury Selection Plan for the Western District of Washington adopted pursuant to the

Jury Selection and Service Act of 1968, 28 U S.C. § § 1861-71, does not comply with the policies set forth in sections 1861-3.[9] We do not reach the merits of this objection because Metcalf failed to make a timely challenge as required by 28 U.S.C. § 1867.[10]

2. Fifth amendment privilege.

During his closing argument, the prosecutor commented:

> "In my opinion what has happened is that the defense has collapsed, because of all the six defendants before you not one of them has brought one witness in to deny that anything that we have alleged happened in terms of the substantive sales that we have told you about.
>
> Mr. Noah brought in no witnesses to deny that he participated in the sales Mr. Stuart brought in no witnesses to deny that he participated in the sales."

At this point the court interrupted the prosecutor and

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[9] Although we have not reached the merits, we note that objections similar to those raised in this case have been rejected by this court. *United States v. Ross*, ... F.2d ..... (9th Cir. October 26, 1972); *United States v. Ware*, ... F.2d ..... (9th Cir. January 31, 1973).

[10] 28 U.S.C. § 1867 reads in part:

> (a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.
>
> . . . .
>
> (e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title.

admonished the jury that the burden of proof was on the prosecution to establish guilt, not on the defendants to prove innocence, and that the defendants had no burden to prove anything. Later the court instructed the jury that the prosecutor's comments were improper and they should not be considered.

Metcalf contends that the prosecutor's comments infringed his Fifth Amendment privilege and violated the doctrine of *Griffin v. California*, 380 U.S. 609 (1965), and that neither the court's admonition nor the later instruction rendered the error harmless.

The comments in this case are quite different from a specific comment on the defendant's failure to take the stand. "[W]here the prosecutor confines himself to arguing the strength of his case by stressing the credibility and lack of contradiction of his witnesses, we will not be astute to find in this a veiled comment on the defendant's failure to testify even if in practical fact, although not in theory, no one else could controvert them." *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1270 (2nd Cir. 1969), *cert. denied* 397 U.S. 1050 (1970); *accord, United States v. Lepiscopo*, 458 F.2d 977 (10th Cir. 1972).

Here the disputed comments were specifically directed to the lack of contradictory witnesses and contained no explicit reference to the failure of the appellants to testify. We do not think that it focused attention on their failure to testify. The trial judge understood the comment to be directed at the weight of the evidence because in his correction he instructed the jury as to the burden of proof, not the Fifth Amendment rights of the appellants.[11]

[11] While we think the comment was ill-advised, it was not of such a character

Even if we found the comment impermissible, it was harmless error. The comment by the prosecutor was brief, composed of only three sentences. The silence of the appellants was not mentioned to the jury. The trial judge immediately interrupted and properly instructed the jury as to the burden of proof. Any impropriety was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967); *Milton v. Wainwright*, 407 U.S. 371 (1972).

HUMPHREY ROSS

1. Insufficiency of the evidence.

On appeal the evidence is viewed in the light most favorable to the government. *Glasser, supra; Magana, supra.* Ample evidence sustains Ross's conviction. Although Ross never directly sold any narcotics, there was sufficient evidence that he actively assisted in the completion of two illegal sales. Ross drove Stuart to the place where the sales were completed and there was evidence that Ross supplied Stuart with the heroin used in the sales.

2. Denial of the motion for severance.

Ross moved for a separate trial pursuant to Rule 14, F.R. Crim.P., on the ground that if tried with his co-defendants he would be denied supposedly exculpatory testimony from two of them. The trial judge ruled that Ross failed to show the prejudice required by Rule 14 for a severance. The ruling will not be reversed absent a clear abuse of discretion. *United States v. Figueroa-Paz*, ... F.2d ..... (9th Cir. October 20, 1972); *Daut v. United States*, 405 F.2d 312, 314 (9th Cir. 1968), *cert. denied* 402 U.S. 945 (1971)

that the jury would naturally and necessarily take it to refer to the appellant's failure to testify. *United States v. Hawk Wing* 459 F.2d 428, 430 (8th Cir. 1972).

Ross made no affirmative showing that the two co-defendants would be willing to testify for him in a separate trial. When there has been an insufficient showing that a co-defendant would actually testify at a severed trial, the district court has not abused its discretion by refusing to grant a motion to sever. *United States v. Thomas*, 453 F.2d 141 (9th Cir. 1971), *cert. denied* 405 U.S. 975 (1972); *Fields v. United States*, 408 F.2d 885 (5th Cir. 1969).

Ross also asserts that his defense was prejudiced by his joinder with others who had sold narcotics directly to government agents. The burden of proving prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review. *United States v. DeSapio*, 435 F.2d 272, 280 (2nd Cir. 1970), *cert. denied* 402 U.S. 999 (1971). Again, we find no abuse of discretion.

3. Prejudicial publicity.

This argument has already been considered and rejected. See part 4 of the Noah opinion, *supra*.

4. Fifth amendment privilege.

This argument has already been considered and rejected. See part 2 of the Metcalf opinion, *supra*.

5. Instructions.

Ross asserts that the court erred when it refused to give the jury his requested instruction on conspiracy.[12] There is

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[12]The rejected instruction read:

"The mere knowledge, approval or acquiescence in the object or purpose of a conspiracy by the defendant is insufficient to convict inasmuch as the accused must in some sense promote the venture himself, make it his own, or have a stake in its outcome before he is guilty as a 'conspirator' and/or 'abettor'."

no requirement that any specific instruction must be accepted. It is, however, reversible error not to instruct as to defendants' theory of the case if the record contains evidentiary support for the theory and the theory is supported by law. *Perkins v. United States*, 315 F.2d 120, 124 (9th Cir.), *cert. denied* 375 U.S. 916 (1963).

Ross contends that the instructions given failed to allow for the possibility that Ross might be acquainted with the members of the conspiracy and still not be a co-conspirator because he had no financial stake in the success of the conspiracy. Ross is incorrect in his assumption that each conspirator must have a financial stake in the venture. All that is required is that he not be indifferent to its outcome. *United States v. McKnight*, 253 F.2d 817 (2nd Cir. 1958).

The instructions actually given state that the defendant must have willfully participated with the intent to advance some object of the conspiracy, and that mere similarity of conduct or association does not establish a conspiracy. These instructions adequately presented defendant's theory of the case.

6. Peremptory challenge.

During the selection of the jury the government excused the only black member of the jury panel. Ross, a black, contends that this prejudiced his case. Since there is no evidence of any purposeful discrimination, there is no basis for Ross's objection. *Swain, supra* at 221. A criminal defendant has no constitutional right to a proportionate number of his race or ethnic group on the jury that tries him. *United States v. Gonzalez*, 456 F.2d 1067, 1068 (9th Cir. 1972).

7. Conspiracy conviction

Ross does not raise this issue, but we note that like Stuart he was also convicted on two conspiracy convictions As in Stuart's case we vacate the conviction on the first conspiracy count and order that it be dismissed. Like Stuart this does not affect Ross's sentence since he also received other similar concurrent sentences. These other convictions are not tainted by the improper conspiracy conviction

However, in addition to receiving terms of imprisonment, Ross was also fined $7,500 for each of his four convictions Since one of the convictions is invalid, one $7,500 fine is dismissed.

The judgments of conviction, and sentences of all appellants are affirmed, except that the convictions of Stuart and Ross on the first conspiracy count for violation of 21 U S C § 841(a) are vacated and ordered dismissed, and one of the $7,500 fines levied on Ross is stricken.

APPENDIX "B"

ORDER

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v HUMPHREY ROSS, Defendant-Appellant.

No. 72-1865.

[Filed April 25, 1973]

Before: BARNES and CHOY, Circuit Judges, and JAMESON* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say. I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding, that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MAY 2nd, 1973, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (HUMPHREY ROSS v. UNITED STATES OF AMERICA) on the following named party by depositing TWO COPIES thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California addressed to said party at the address as follows.

UNITED STATES ATTORNEY
FOR THE WESTERN DISTRICT OF WASHINGTON
1050 FIFTH AVENUE
SEATTLE, WASHINGTON 89104

THREE COPIES of the aforesaid document have been forwarded to the

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MAY 2nd, 1973, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean Standefer, 326½ Main Street, Huntington Beach, Ca.
(714) 536-7161